NO. 48991-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRANDON LEE FARMER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Michael E. Schwartz

No. 14-1-04527-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err by not giving lesser included manslaughter instructions where no evidence was introduced of the shooting having been the product of recklessness, criminal negligence or the act of an accomplice?

2. Did the prosecution commit prosecutorial error when it accurately described the terms of a witness's cooperation agreement, when it elicited testimony about the agreement, and when none of its questions or arguments can be characterized as flagrant and ill-intentioned?

3. Should this Court exercise its discretion, decide whether to award appellate costs after a cost bill is filed, and defer consideration of ability to pay pending a future motion for revision or an objection to an attempt to collect?

B. STATEMENT OF THE CASE.

1. Trial Proceedings.

On November 12, 2014, Appellant Brandon Lee Farmer (the "defendant) was charged with first degree murder for the shooting death of Velma Tirado eight years prior on August 27, 2006. CP 1-2. The case was assigned for trial and called on February 25, 2016. A CrR 3.5 hearing

was held on March 14, 2016. 1 RP 14. Opening statements took place the following day and the case proceeded with the prosecution calling 23 witnesses and the defense calling two, including the defendant.

The prosecution witnesses included several civilian witnesses, a number of police officers, forensic specialists, forensic scientists and the former Pierce County Medical examiner. CP 169-70, Witness Record. The defense witnesses included a forensic pathology expert and the defendant. *Id.* Of the witnesses two were of particular significance because they were present at the scene and provided direct evidence of the circumstances of the shooting. Those two witnesses were the defendant and his one-time friend and neighbor, Dusty Titus. *See* 5 RP 509, et. seq. 7 RP 761, et. seq.

The parties each submitted proposed jury instructions. The state submitted instructions for both first and second degree murder. CP 145-68, Plaintiff's Proposed Instruction to the Jury. The defense submitted first and second degree manslaughter. CP 31-42. Neither party submitted an accomplice instruction nor any supporting instructions for a complicity theory to have been submitted to the jury. *Id.* After hearing argument the trial court declined to give first and second degree manslaughter instructions after applying the factual prong of the lesser included offense analysis. CP 88-106. 8 RP 855-56.

The parties presented closing arguments on March 29, 2016. 8 RP 861 et. seq. The jury returned a guilty verdict for first degree murder on

April 1, 2016. CP 84. The defendant was sentenced to a high end sentence totaling 407 months in prison on April 14, 2016. CP 122-135. 8 RP 934. This appeal was timely filed the same day as the sentencing. CP 138.

2. Statement of Facts.

The murder of Velma Tirado took place in the early morning hours of August 27, 2006. 2 RP 157. The location was an alley near Fawcett Street in downtown Tacoma. 2 RP 159. Lieutenant Barton Hays along with a number of patrol officers responded to a report of shots fired and found Ms. Tirado in the alley deceased from a gunshot wound to the head. 2 RP 160-61. The patrol division secured the scene and initiated a homicide call-out. 2RP 162-63.

Several witnesses heard the shots but none of them saw or could identify the culprits. 2 RP 126-30. 2 RP 172-79. One such witness was an off duty police officer who was working security at a nearby tavern and heard what were likely the shots. 1 RP 82-83. All of the witnesses agreed that there had been two shots. The patrol officer responded to the scene after having been contacted by the witnesses from the alley. 1 RP 83-86. Insofar as the culprit or culprits were concerned he could shed no more light on the shooting than the other witnesses.

The case was assigned to Tacoma Police detective Gene Miller. 4 RP 381. He responded to the scene and conducted a walk-through during

which he noted significant items of interest such as the placement and character of the gunshot wounds, and the location of what few items of evidence were left behind. 4RP 385-92. He subsequently spearheaded the investigation which included (1) talking to five or six dozen street people [4 RP 400], submitting evidence for crime lab examination [4 RP 401-05], and (3) broadcasting police bulletins for information about the likely murder weapon [4 RP 405-07]. Through his investigation Detective Miller determined that Ms. Tirado had likely been engaged in prostitution but none of his efforts led to a suspect. The case went cold in approximately April of 2010. 4 RP 407.

The forensic investigation began with the autopsy. Dr. John Howard testified that Ms. Tirado had been killed by a single close range gunshot wound to the head behind the right ear. 4 RP 455. There was evidence of two shots and due to gunshot residue, the shots must have been fired from close range, meaning less than a foot. 4 RP 441-44. Dr. Howard recovered one of the bullets, exhibit 109, which was then available for forensic examination by the crime lab. 4 RP 450-52.

The crime lab's ballistic examination narrowed the caliber, type and manufacturer of the murder weapon. 6 RP 675-76. The firearms examiner testified that class and individual characteristics of the bullet established that it would have been fired from a .357 caliber Ruger, Smith and Wesson or Taurus revolver. 6 RP 676-78. Such weapons included

single action pistols which the firearm examiner explained would require the gun to be cocked before each shot. 6 RP 678.

Having run out of leads in 2010, Detective Miller got a break in the case in October 2014. 4 RP 414-15. The break consisted of a call from the district attorney's office in Humboldt County California. *Id.* That call led to the detective interviewing Dusty Titus in California in October 2014. *Id.*

Dusty Titus turned out to have driven the defendant to the alley where the murder occurred. He testified twice on March 23, 2016. 5 RP 488, et. seq. 5 RP 509, et. seq. His first testimony was an offer of proof outside the jury's presence concerning a particular probation violation in which he was alleged to have not completed sex offender treatment. *Id.* The trial court ruled that his failure to complete treatment could be admitted but not the sex offender nature of it. 5 RP 502.

Apart from the sex offender treatment little if any restriction was enforced as to Mr. Titus' cross examination by the defense. He thus testified at length about his cooperation agreement, probation matters and the other legal circumstances that led to him appearing as a witness. *See* 5 RP 513-18, 546-53, 579-86. Mr. Titus explained that he had two motives for coming forward: first, he hoped for leniency concerning his probation violations, and second, he wanted to relieve himself of "a rough burden to be carrying on my shoulders." 5 RP 517. During his testimony he did not enumerate all the probation matters he had been facing but he corrected

the defense as to some of them by pointing out that some of the violations reflected in defense exhibits were not his and had been dismissed in court. 5 RP 583-84. At the time he was testifying he had one matter left to appear on for sentencing. 5 RP 597.

The substance of Mr. Titus' testimony was that he had driven the defendant to the scene the night of the murder but had been surprised when the defendant shot Ms. Tirado in the head during an act of prostitution. 5 RP 536-38. He stated that the gun belonged to the defendant and that it was a .357 caliber, single action revolver. 5 RP 520-23. He further stated that after the murder he had bought an identical type of gun and identified his gun as one of the exhibits in court. 5 RP 522-24. (The firearms examiner excluded Mr. Titus' gun as the murder weapon due to rifling imprint on the bullet from Ms. Tirado. 6 RP 680-82.) Mr. Titus stated that two shots were fired, that the first shot went awry when Ms. Tirado pushed the gun away with her hand. 5 RP 536-38. He testified that the defendant was undeterred and that he had fired the second shot immediately after the first. *Id.*

The defense case included testimony from a forensic pathologist who clarified the nature of the two shots. Dr. Clifford Nelson testified that the muzzle to target distance was approximately six inches for the fatal wound [7 RP 747], that an injury to Ms. Tirado's hand and stippling on her face showed that she had her hand up by her face during one of the shots [7 RP 749-54], and that the autopsy findings were consistent with

Ms. Tirado covering up and turning away from the shooter when the second shot was fired [7 RP 758]. This corroborated Mr. Titus' description of Ms. Tirado having pushed the gun away during the first shot.

The defendant also testified. He flatly stated that it was Dusty Titus that shot Ms. Tirado and that at the time he was in the driver's seat on the other side of the pickup truck. 7 RP 763, 768, 771. He claimed that there were two shots, that he started the truck to leave, and that afterward in confusion he "stopped on the side of the road to try to figure out what was going on and what to do." 7 RP 773. At no time did he say that he knew that Mr. Titus was going to shoot or otherwise do violence to Ms.Tirado, and he also said nothing about assisting Mr. Titus or having been ready to assist him in any way. He claimed that Ms. Tirado may have pushed Mr. Titus just before the first shot. He also admitted to having had possession of the gun for a short period of time but claimed that he gave it to Mr. Titus well before the night of the murder because Mr. Titus wanted to buy it. 7 RP 781. He further admitted it was revolver and that to fire a single action pistol one would have to pull the hammer back each time. 7 RP 792-96.

The parties presented closing arguments on March 29, 2016. 8 RP 861-902. The state argued that Mr. Titus was credible while the defendant was not. Neither party argued that the defendant had assisted or agreed to

assist Mr. Titus in the shooting of Ms. Tirado. The jury returned a guilty verdict three days later on April 1.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN ITS APPLICATION OF THE FACTUAL PRONG OF THE LESSER INCLUDED OFFENSE TEST WHERE NO EVIDENCE OF RECKLESSNESS, CRIMINAL NEGLIGENCE OR ACCOMPLICE LIABILITY WAS INTRODUCED THAT COULD SUPPORT FIRST OR SECOND DEGREE MANSLAUGHTER INSTRUCTIONS.

Since at least 1978 Washington has required that two conditions must be met for lesser included offense instructions to be given in a particular case. ***State v. Workman***, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978). The so-called *Workman* test requires first, analysis of the elements of the lesser and greater offenses, the legal condition, and second that "the evidence in the case must support an inference that the lesser crime was committed." *Id.,* citing ***State v. Snider***, 70 Wn.2d 326, 422 P.2d 816 (1967).

In this case the crimes at issue are first degree premeditated murder and first and second degree manslaughter. As to the legal part of the *Workman* test, the parties and the trial court were all in agreement that the legal part of the test was met. 8 RP 855-56. This was correct and is not an

issue disputed by the state in this appeal. ***State v. Berlin***, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). The factual part of the test is another matter.

The Supreme Court has elaborated on the factual part of the *Workman* test. "It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." ***State v. Berlin***, 133 Wn.2d 546, quoting ***State v. Fowler***, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), citing ***State v. Rodriguez***, 48 Wn. App. 815, 820, 740 P.2d 904 (1987). The question is whether "the evidence presented affirmatively established either first or second degree manslaughter." *Id.* at 551.

To satisfy the factual part of the *Workman* test in this case it would be necessary to show how Ms. Tirado's death was attributable to recklessness or criminal negligence of the defendant. First degree manslaughter is defined as having been committed if one "recklessly causes the death of another person. . . ." RCW 9A.32.060(1)(a). *See* CP 31-42, Proposed Instruction No.s 4-5 and 8-12.[1] Recklessness is defined as occurring when one "knows of and disregards a substantial risk that a wrongful act may occur" and "the disregard of such substantial risk is a

[1] The defendant did not propose a number of instructions that would have been necessary if the evidence had supported lesser included first and second degree manslaughter. The defendant did not propose definitions of recklessness or criminal negligence or knowledge or accomplice.

gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(c).

Setting aside for a moment who the shooter was in this case, the actions of the shooter were neither reckless nor criminally negligent. They were intentional and premeditated. To start with, a number of facts concerning the shooting were not in serious dispute, namely: (1) the victim's death was caused by a single gunshot wound to the head from close range [4RP 386-87, 396; 441-51, 457-58. 7RP 742-47, 749-55, (2) all of the witnesses (and the defendant) agreed that the gunman fired not one but two shots in quick succession [*Id.* 1RP 83-84. 2RP 128, 134, 136-38, 175-76. 5RP 536-41, 572-74, 588-89. 7RP 772, 792-98.]; (3) the shots were fired from a single action handgun that had to be cocked each time it was fired [5RP521-24, 554-62, 576-77. 7RP759, 802, 806-08.]; and (4) the undisputed medical evidence (including the defense expert) showed that the gunman fired twice in the direction of the victim's head and that she avoided having been killed by the first shot only by pushing the gun or the gunman's hand away just as the trigger was pulled [4RP 386-87, 396; 441-51, 457-58. 7RP 742-47, 749-55.]. It is all but impossible to discern from these facts how the gunman's actions could be considered reckless or criminally negligent. To fire the second shot into Ms. Tirado's head, behind her ear from close to contact range the gunman had to cock the weapon, point the muzzle at that area of her head and pull

the trigger. These are necessarily premeditated and intentional acts, not reckless or negligent acts.

The foregoing facts must be considered in light of the particular requirements of the factual part of the standard. The "factual showing must be 'more particularized than that required for other jury instructions' and 'must raise an inference that only the lesser included ... offense was committed to the exclusion of the charged offense.'" ***State v. Hunter***, 152 Wn. App. 30, 44, 216 P.3d 421, 428 (2009), quoting ***State v. Fernandez–Medina***, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). "To satisfy Workman's factual prong, [the defense] was required to demonstrate to the trial court that, viewed in the light most favorable to him, the jury could find him guilty of the inferior or lesser offense only." ***State v. Gamble***, 137 Wn. App. 892, 906, 155 P.3d 962 (2007), citing ***State v. Tamalini***, 134 Wn.2d 725, 729, 953 P.2d 450 (1998). Under these standards it is difficult if not impossible to imagine how the gunman's actions could be deemed a mere knowing of and disregarding of a substantial risk. RCW 9A.08.010(c). Considering just what the gunman had to do to make the gun fire both times, his actions could hardly be called reckless.

The same analysis applies but with even greater force to second degree manslaughter. RCW 9A.32.070(1). The mental state is criminal negligence which is defined as when a perpetrator "fails to be aware of a

substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(d). Here there is no evidence that the gunman failed to be aware of the risk of death from a gunshot wound behind the ear of Ms. Tirado. He was aware because he meant to do exactly what he did with exactly the outcome one would expect from a shot fired from a .357 caliber handgun at a woman's head.

The foregoing discussion leaves aside who the gunman was. On the basis of the gunman's actions alone the lesser included instructions were properly rejected. This is even more the case when the defendant's testimony is taken into account. The evidence must affirmatively establish "the defendant's theory on the lesser included offense before an instruction will be given." ***State v. Berlin***, 133 Wn.2d 541, 546, 947 P.2d 700 (1997), quoting ***State v. Fowler***, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), and citing ***State v. Rodriguez***, 48 Wn. App. 815, 820, 740 P.2d 904 (1987). Here the defendant's theory was that Dusty Titus was the gunman and that Dusty Titus committed all of the above-described premeditated and intentional acts.

For the defendant to have been guilty of a crime committed by Dusty Titus, the defendant would have needed to be an accomplice. RCW 9A.08.020 provides that "(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally

accountable. (2) A person is legally accountable for the conduct of another person when . . . (c) He or she is an accomplice of such other person in the commission of the crime." The accomplice definition is found in the same section of the statute and specifies both a required mental state and enumerated actions. An accomplice must act "with knowledge that [enumerated actions] will promote or facilitate the commission of the crime. . . ." RCW 9A.08.020(3)(a).

In the first instance it is important to note that neither party proposed an accomplice instruction. This alone precludes review because, "A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. . . The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). Furthermore, where "an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." ***State v. Olson***, 126 Wn.2d 315, 321, 893 P.2d 629, 632 (1995) (emphasis in the original).

In this case the defendant has not raised, discussed, argued or cited any authority for his implicit argument that he could have been convicted of manslaughter as an accomplice for a killing committed by Mr. Titus. Had the defendant included such argument, however, it would have been

of no consequence. In order for the defendant to have been convicted as an accomplice of either degree of manslaughter the state would have been "required to prove that [the defendant] *actually* knew that he was promoting or facilitating . . . the commission" of those particular crimes. ***State v. Allen***, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis in the original), citing ***State v. Shipp***, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980) (An accomplice must have actual knowledge that the principal was engaging in the crime eventually charged.). Thus in this case the defendant would have needed to have actual knowledge that Dusty Titus was going to commit a reckless or negligent killing.

Even if it is possible to have knowledge of that another person will engage in unintentional behavior in the future, in this case there is no evidence the defendant had such knowledge. The defendant's testimony included denials of knowing what Dusty Titus was going to do and of any act that could be characterized as aiding in the shooting. He testified that he was that he was in the driver's seat of the pickup and did not see what happened between Ms. Tirado and Dusty Titus. 7RP764-68, 772, 792-96. In particular concerning the fatal second shot the defendant claimed he was nowhere near Ms. Tirado and Mr. Titus:

> Q. When this took place, you watched -- according to your testimony, you watched Dusty pull her out of the cab, push her back to the edge of the cab where the bed starts, point a gun directly at where she would have been and pulled the trigger twice, correct?
> A. Yes, sir.

Q. But you are telling the jury that you didn't know if he had shot her?
A. I didn't see her shot. I didn't see her laying there shot, no.
Q. You didn't look either?
A. No.

7RP 797.

From start to finish the defendant denied (1) that he knew what was allegedly about to happen between Ms. Tirado and Mr. Titus, and (2) that he did anything to aid or let Mr. Titus know that he was ready to aid in a shooting. Were it possible to have knowledge that an unintentional act was about to occur, there is no evidence to support the implicit defense claim that the defendant had such knowledge.

The lack of knowledge is a sufficient reason for rejecting the defendant's lesser included argument. But so too is any reasonable inference from how the shooting occurred. The defendant argues that Dusty Titus may have accidentally pulled the trigger (of a single action pistol) twice. For the sake of argument it may be conceded that if the gun had been pre-cocked before the first shot, that shot could have been accidental. However the second shot, which required that the gun be re-cocked, aimed and fired could not have been. No matter how recklessness and criminal negligence and accomplice liability are dissected there is no evidence that the defendant knew that he was facilitating a reckless or negligent killing using a single action pistol that fired two shots.

The argument in this case that Dusty Titus may have been reckless or negligent is insufficient. That argument is nothing more than a suggestion that the jury might have disbelieved the state's evidence and believed the defendant. ***State v. Guilliot***, 106 Wn. App. 355, 367, 22 P.3d 1266 (2001) ("A mere possibility that the jury might disbelieve the State's evidence is not justification for a lesser included instruction."), citing ***State v. Pettus***, 89 Wn. App. 688, 700, 951 P.2d 284 (1998). If the jury had believed the defendant that Mr. Titus was the gunman, the defendant would have been acquitted. The jury instructions did not allow him to be convicted for any crime committed by Mr. Titus. For this reason, even if the defendant's failure to preserve and failure to adequately brief the issue is overlooked, his arguments concerning the supposed accidental actions of Mr. Titus are of no consequence. The defendant's lesser included arguments are not well taken.

2. IN LIGHT OF THE TERMS OF MR. TITUS' COOPERATION AGREEMENT, THE PROSECUTION DID NOT COMMIT REVERSIBLE ERROR WHEN IT ACCURATELY DESCRIBED THE AGREEMENT, WHEN ITS STATEMENTS AND ARGUMENTS CAUSED NO PREJUDICE, AND WHEN NO ERROR CAN BE CHARACTERIZED AS FLAGRANT AND ILL-INTENTIONED.

To prevail on a claim of prosecutorial error a defendant must show that the prosecutor's action was improper and prejudicial. ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). ***State v. Stenson***, 132

Wn.2d 668, 718-19, 940 P.2d 1239 (1997), citing ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407 (1986) and ***State v. Luvene***, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). A prosecutor's action is prejudicial "only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" ***State v. Yates***, 161 Wn.2d 714, 774-75, 168 P.3d 359 (2007), citing, ***State v. McKenzie***, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), quoting ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Prosecutorial error may be based on alleged improper conduct during a trial or in closing argument. ***State v. Lindsay***, 180 Wn.2d 423, 326 P.3d 125 (2014). Concerning error during a trial, in egregious cases such as where the "prosecutor and the lawyer for [a defendant] engaged in unprofessional behavior, trading verbal jabs and snide remarks throughout over 90 volumes" a trial court's failure to maintain decorum may result in reversible error. *Id.* at 426-27. The standard to be applied to evaluate prosecution conduct during trial is: "(1) whether the prosecutor's actions were improper; and (2) if so, whether the improper action caused prejudice." *Id.* at 431, citing ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

Prosecutorial error can also arise during closing arguments. In such cases, the impropriety analysis must take into account that a prosecutor is permitted wide latitude to argue the facts in evidence, draw reasonable inferences from the evidence and express those inferences to the jury. ***State v. Stenson***, 132 Wn.2d. at 727, citing ***State v. Hoffman***,

116 Wn.2d 51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998) and ***State v. Fiallo–Lopez***, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995). Furthermore the prosecutor's argument is examined "in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) (Argument that "[victim] has come in here to be 100 percent honest" was not improper in light of the prosecutor's review of the evidence and where "[i]n context, it is clear that the prosecutor was not personally vouching for the credibility of [the victim]."), citing ***State v. Russell***, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).

In this case the defense alleges error during both the trial and closing argument. However the instances of alleged error are related to the same issue, namely the prosecution's characterization of Dusty Titus' cooperation agreement. Cooperation agreements, or as the Supreme Court has characterized them, "informal immunity agreements" are "contractual in nature" and are subject to a requirement of "fundamental fairness." ***State v. Bryant***, 146 Wn.2d 90, 100, 104-05, 42 P.3d 1278 (2002). Fundamental fairness means in part that "absent credible evidence that the informant testified untruthfully or otherwise failed to perform, the government must scrupulously perform its end of the bargain." *Id.*

Where a cooperating witness testifies against another defendant, it would surprise no one that some or all of its terms are admissible. ***State v. Jessup***, 31 Wn. App. 304, 316, 641 P.2d 1185 (1982). "Evidence that a witness is testifying pursuant to a plea agreement is usually admissible to show bias. . . It, like other circumstantial evidence, may be rebutted by evidence of explanation. The plea agreement may be portrayed fully and placed in context so the jury is not misled about its terms or importance. . . ." *Id.* quoting ***United States v. Roberts***, 618 F.2d 530, 535 (9th Cir. 1980).

In this case evidence concerning the "informal immunity agreement" or cooperation agreement that led to Dusty Titus testifying was introduced primarily through Mr. Titus, his Humboldt County probation officer and the lead detective Gene Miller. *See* 5 RP 513-18. 5 RP 592-629. 6 RP 701-13. In addition, the court but not the jury had access to a number of exhibits consisting of statements and probation violation matters related to Mr. Titus. CP Exhibits 95, 116-118, 120-123. From the testimony of these witnesses, and from the exhibits it is apparent that Mr. Titus entered into (1) an oral agreement, (2) between at least three parties, namely Mr. Titus, the district attorney in Humboldt County, California, and the prosecution in this case, that (3) had not been completed at the time he testified in this trial. *Id.*

The benefit that Mr. Titus ultimately expected was not set in stone. He testified about his own understanding of the then current status of his probation matters and his plea agreement:

> Q. All right. And so the California authorities, they held off a pretty long time any sanction while this case was pending, moving forward, correct?
> A. Yeah.
> Q. Eventually though, have all of your violations been worked out down in California?
> A. Yes, except for I have a sentencing next month for the newest one
> Q. Okay. And are you otherwise in compliance with your probation right now?
> A. Yes.
> Q. And if you stay in compliance from today forward, are you looking at any more jail time?
> A. No.
> Q. At any point did you enter into any kind of formal plea agreement with anybody from the Washington prosecutors?
> A. No.
> Q. How about down in California?
> A. No.
>
> 5 RP 517-18.

He also testified about his motivation for providing information about the murder in the first place:

> Q. Okay. And that's the point when you came forward to tell law enforcement about what happened up here in Tacoma; is that right?
> A. Well, yeah. I talked to my attorney about it.
> Q. Okay. And was that, in part, to see if you could get treated better or better treatment for the potential custody time, in part?
> A. Yes, in part.
> Q. Were there any other reasons that you came forward with the information?

A. Just because it was -- it was a rough burden to be carrying on my shoulders.

5 RP 517.

It will come as a surprise to no one that Dusty Titus was cross examined about his cooperation agreement. *See* 5 RP 546-553, 579-86. During his cross examination he testified that some of the probation violations were dismissed:

A. Yes, and if you were to look into it a little bit more I was -- I had bailed out of jail and if there was a probation violation there would have been a hold placed on me through probation, and these charges here, all of them were dropped because none of this stuff was mine.
Q. Okay. So do you know whether that report was recommending eight years? If you flip the page, I would ask you if that refreshes your memory.
A. That's what it says in the paperwork, but I have never been told that my probation was revoked either by a judge or a probation officer.
Q. But you remember that report now?
A. No, I have never seen this actual report, and nobody had ever told me. I just knew that the charges were there and they got dropped in court.

5 RP 583.

Furthermore, irrespective of exactly the potential penalty that he was facing in California, Mr. Titus testified a few minutes later that, "No, there was no promise either down there or up here. . . There was no guarantee that I wouldn't get charged, or they were going to help me out in any way." 5RP 587.

Neither Mr. Titus' Humboldt County probation officer, nor Detective Miller contradicted Mr. Titus. The probation officer testified that insofar as the penalty for any of the probation violations was concerned the term of incarceration is wholly in the hands of the judge. 5 RP 594-95. Furthermore, the probation officer and the probation department were not party to any agreement, were largely kept in the dark about his cooperation by the district attorney's office, and at no time were asked to extend leniency to Mr. Titus. 5 RP 597-99. As to Detective Miller, he confirmed that Mr. Miller was not provided immunity, and in fact stated, "Well, it's entirely possible that he was looking for consideration, that doesn't mean he got it, and no, I don't remember seeing that report." 6RP 706.

In should be noted that other than during the closing argument, the defendant's allegations of prosecutorial error did not lead to an objection. Where no objection is made, a defendant is deemed to have waived any error and must show not only improper conduct and prejudice, but must further show that the alleged error was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. ***State v. Emery***, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012). Judged by this standard, the complained of passages from the prosecution's opening

statement and its examination of witnesses would need to be egregious indeed. They are not.

The prosecution's opening statement included both aspects of Mr. Titus' motivation to cooperate. In the first instance the prosecution stated accurately that "Mr. Titus got himself into a little of trouble. He got put on probation, and he got into more trouble . . . he is in a little bit of trouble. So he talks to his lawyer and says, I have got some information. And his lawyer says, well, why don't you talk to our investigator, and he tells the investigator what happened up here. The defense investigator contacts the prosecutor, the prosecutor's investigator, and he tells that investigator what happened." 3/15/2016 RP 18. Later in the prosecution's chronology the prosecutor accurately described the other side of Mr. Titus' mindset, namely, that after moving from Tacoma to Shelton, he confided in his family, and that after Shelton he moved to California and during all that time he got older. 3/15/2016 RP 23. In addition to facing legal trouble he came clean because it was time to tell people what happened. 3/15/2016 RP 23-24. None of this is inconsistent compared to Mr. Titus' testimony and the testimony of the probation officer and the detective.

During testimony, the prosecution again accurately portrayed the cooperation agreement and Mr. Titus' motivation. As to the agreement, its

essential terms were that Mr. Titus would cooperate concerning the murder of Ms. Tirado in the hope that his cooperation would be taken into account by the Humboldt County judge who would eventually decide the penalty for the probation matters then still pending. 5 RP 517.

In closing argument, the prosecution, accurately and consistently with the terms of the plea agreement and all three witnesses, pointed out that Mr. Titus had not been granted immunity but had still testified. 8RP 864-66. In addition the prosecution reminded the jury that Mr. Titus had cooperated even though he had owned a gun of the same caliber as the murder weapon. *Id.* His gun however was excluded via ballistic testing as the gun that had fire the bullet into the head of Ms. Tirado. *Id.* 6 RP 680-82.

None of the foregoing generated an objection. Nor could it have. The prosecution did not stray from the testimony actually introduced during the trial. The only objection was to the perfectly accurate argument that if Mr. Titus had been guilty of the shooting there were ways "to help himself out . . . without placing himself at the scene." 8RP 866. The defendant's objection was overruled because there was nothing wrong with arguing about how Mr. Titus' behavior was consistent with his having not been the gunman. *Id.*

The complained of rebuttal argument likewise generated no objection. Again, this was because it was entirely based on the actual testimony. At the beginning of the paragraph quoted on p. 35 of the defendant's brief, the prosecution argued as follows:

> Mr. Connick suggested that we are trying to argue that Dusty Titus received no benefit. We are not saying that. In fact, he told you, and I told you in opening, that he came forward for two reasons: One was this was weighing on his conscience, and the other was he was in trouble and he was hoping he would get some consideration.
>
> 8RP 896.

While this may not be verbatim compared to how Mr. Titus said the same thing in his testimony, it is pretty close. *See* 5 RP 517.

It is incumbent on the defendant to show that alleged instances of prosecutorial error not preserved are especially egregious. ***State v. Emery***, 174 Wn.2d at 760-61 (In the absence of objection the defendant must show that the alleged error was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.). In this case the defendant has not shown error at all much less egregious error that could be characterized as flagrant and ill-intentioned. Instead the defense conflates a formal immunity agreement with the informal agreement at issue in this case.

Formal immunity agreements are quite different than the cooperation agreement in this case. CrR 6.14 provides in relevant part:

> In any case the court on motion of the prosecuting attorney may order that a witness shall not be excused from giving testimony . . . on the ground that such testimony may tend to incriminate . . . but the witness shall not be prosecuted or subjected to criminal penalty or forfeiture for or on account of any transaction, matter, or fact concerning which the witness has been ordered to testify pursuant to this rule. . . .

Mr. Titus never invoked his Fifth Amendment privilege. Thus there was no reason for him to be given immunity. He willingly cooperated. Under these circumstances the defense suggestion that Mr. Titus was granted immunity is inconsistent both with the facts and the law in this case. The prosecution cannot be accused of misconduct for actions that it never took. The defendant's prosecutorial error allegations should be rejected.

3. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY THIS COURT SHOULD EXERCISE ITS DISCRETION, AWARD APPELLATE COSTS AND DEFER CONSIDERATION OF THE DEFENDANT'S ABILITY TO PAY PENDING A FUTURE MOTION FOR REVISION OR AN ATTEMPT TO COLLECT.

RCW 10.73.160(2) states that "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." This provision provides appellate courts with legislative authorization to order the recoupment of some or all of the costs of an appeal from a defendant who does not prevail. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). In ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612

(2016), Division I stated that the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2 and ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). The issue is not whether this Court can order appellate costs, but whether it should, when and how much.

The idea that those convicted of a crime should be required to pay some of the expense is not new. In 1976, the legislature enacted RCW 10.01.160 concerning trial court costs. A short time afterward in ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that costs which included contribution for appointed counsel under this statute did not "impermissibly burden defendant's constitutional right to counsel." *Id.* at 818.

Imposition of appellate costs is also not new. The statute was enacted in 1995 in response to ***State v. Rogers***, 127 Wn.2d 270, 281, 898 P.2d 294 (1995), which held that appellate costs could not be awarded in the absence of statutory authority. *See* Laws of 1995, Ch. 275 § 3, and ***State v. Nolan***, 141 Wn.2d at 623. ***Nolan*** examined RCW 10.73.160 and noted that it was enacted in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs including statutory attorney fees. *Id.* at 627. In ***Blank***, supra, at 239, the Supreme Court held the statute constitutional and affirmed this Court's award of appellate costs as "reasonable." *See* ***State v. Blank***, 80 Wn. App. 638, 643, 910 P.2d 545 (1996).

In both ***Nolan*** and ***Blank***, the defendant initiated review of the appellate costs issue by filing an objection to the state's cost bill. ***State v. Blank***, 131 Wn.2d at 234, ***State v. Nolan***, 141 Wn.2d at 622. As to a defendant's ability to pay, the court in *Blank* stated: "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." ***State v. Blank***, 131 Wn.2d at 242 (footnote omitted).

In light of the Supreme Court's "common sense" observation in *Blank*, it can be argued that conditioning "appellate review" of an appellate costs issue on whether "the issue is raised in an appellant's brief" prematurely raises an issue not then properly before the court. The court in *Sinclair* concluded (somewhat in contradiction of ***Blank***) that, "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor." ***State v. Sinclair***, 192 Wn. App. at 389. In addition, under RCW 10.73.160(4), the proper time for considering a defendant's ability to pay appellate costs is when the state seeks to collect. ***State v. Blank***, 131 Wn.2d at 242; ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), citing ***State v. Baldwin***, 63

Wn. App. 303, 310-311, 818 P.2d 1116 (1991). At that time there would generally be no need to speculate as to the defendant's financial status and thus an accurate and timely determination can be made of whether the costs "will impose a manifest hardship on the defendant or the defendant's immediate family." RCW 10.73.160(4).

Prior to the time of collection, the determination of whether the defendant either has or will have the ability to pay is necessarily speculative. ***State v. Baldwin***, 63 Wn. App. at 311, ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). It has been suggested that the proper time for determining if a defendant is indigent "is the point of collection and when sanctions are sought for nonpayment" as to appellate costs. ***State v. Blank***, 131 Wn.2d at 241–242, ***State v. Wright***, 97 Wn. App. 382, 383-84, 965 P.2d 411 (1999). In summary, as noted in *Blank* "there is no reason [at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." *Id.* at 253.

It is important to acknowledge that in *Blazina*, the Supreme Court rejected the argument that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." ***State v. Blazina***, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote one), ***State v. Shirts***, 195 Wn. App. 849, 854-55, 381 P.3d 1223 (2016). However, the statute at issue in ***Blazina*** and ***Shirts*** specifically prohibited trial courts from ordering a "defendant to pay costs unless the defendant is or will be able

to pay them." RCW 10.01.160(3). That prohibition is not included in the appellate costs provision. *See* RCW 10.73.160.

Most criminal defendants are represented on appeal at public expense. RCW 10.73.160(3) specifically allows for "recoupment of fees for court-appointed counsel." Since defendants with "court-appointed counsel" are necessarily indigent, the statutory provision for attorney fees would be meaningless if such fees were invariably denied on the basis of ability to pay. By enacting RCW 10.01.160 and RCW 10.73.160, the legislature expressed its intent that criminal defendants, including the indigent, should contribute to the cost of their cases.

RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 was enacted in 1995. These legislative determinations should be given full effect. An award of costs should reflect to some extent the cost to the public of an appeal. Insofar as attorney fees are concerned, courts are called upon to judge the reasonableness of an award with some frequency. It is submitted in this case that a rational basis on which this court may exercise its discretion could be this Court's view of the quality of the appellate lawyering exhibited in the appeal compared to the amount submitted in a cost bill as having actually been expended. Presumably this would approximate the market value to the defendant of the effort expended on his behalf. As to ability to pay, this Court can award appellate costs, including attorney fees, on the basis of the actual cost of this appeal or even with a discount, secure in the knowledge that ability to

pay must be taken into account "before enforced collection or any sanction is imposed for nonpayment. . . ." ***State v. Blank***, 131 Wn.2d at 242.

D. CONCLUSION.

For the foregoing reasons the state respectfully requests that the defendant's convictions be affirmed and that any decision on appellate costs be deferred pending submission of a cost bill.

DATED: Tuesday, January 31, 2017.

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Pierce County
Prosecuting Attorney

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WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/1/17
Date Signature

PIERCE COUNTY PROSECUTOR

February 01, 2017 - 10:15 AM

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